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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/941,400	08/28/2001	Devin Eugene Mix	12929.1064US01	6151
23552	7590	04/09/2004	EXAMINER	
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			GREEN, BRIAN	
			ART UNIT	PAPER NUMBER
			3611	

DATE MAILED: 04/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/941,400	MIX, DEVIN EUGENE	
	<b>Examiner</b>	<b>Art Unit</b>	
	Brian K. Green	3611	<i>MLW</i>

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 15 January 2004.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-48 is/are pending in the application.
- 4a) Of the above claim(s) 4,6,15,17,24,30,38 and 44 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5,7-14,16,18-23,25-29,31-37,39-43 and 45-48 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Election/Restrictions*

Claims 4,6,15,17,24,30,38, and 44 withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper No. 8.

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3,5,7,11-14,16,18,22,23,25,28,29,31,32,36,37,39,40,43,45, and 46 are rejected under 35 U.S.C. 102(b) as being anticipated by Pyper (U.S. Patent No. 1,382,229).

Pyper shows in figures 1-5 a “fireplace” including a front panel (12 having an opening for viewing) and a flame simulation apparatus including a flame element (20) coupled to a moving means (21,22,23,24,25 and 28,29) that alters the position of the flame element. Pyper shows in figure 3 that the moving means is adjustable about a vertical axis (the axis adjacent element 23 or element 25). The axis would be vertical when the back or front surface of the device is either secured or supported on a horizontal surface, i.e. attached to a ceiling, supported on a desk or table, during shipping, etc. In regard to claim 2, Pyper shows a blower (28,29). In regard to claim 3, the blower (28,29) moves the flame element and is considered to be a means

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for moving the flame element from a fixed position. In regard to claim 5, Pyper shows a blower (28,29) and a mechanical device (21,22,23,24,25) for moving the position of the element (20) relative to the rest of the structure. The applicant defines in the specification, page 9, lines 1-8, that any mechanical means can be used to move the flame element. Since the applicant defines the mechanical means in such a broad manner, the mechanical device of Pyper is considered to fall within the applicant's definition of moving means. In regard to claim 7, Pyper shows a light source (19). In regard to claim 11, Pyper shows in figure 1 a log set (the structure directly below the flame in figure 1 is considered to be the log set as broadly defined).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3,7,8,12-14,18,19,23,25,26,28,29,31-33,37,39-41,43, and 45-47 are rejected under 35 U.S.C. 102(e) as being anticipated by Harrison (U.S. Patent No. 6,461,011) in view of Quigley (U.S. Patent No. 1,945,072).

Harrison shows in figures 1-5 a "fireplace" including a front panel (any of the four side panels which have to be at least translucent in order to allow the flame to be seen) and a flame simulation apparatus including a flame element (14) coupled to a blower (18) that alters the position of the flame element. Harrison does not disclose providing a moving means to move the flame element about a vertical axis. Quigley shows in figures 1-4 a display device (8) that is

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rotated about a vertical axis by a moving means (18-23,29-31). In view of the teachings of Quigley it would have been obvious to one in the art to modify Harrison by attaching a moving means to the fireplace since this would allow the fireplace to be rotated which would create a more amusing and attention grabbing display. In regard to claim 3, the blower (18) is positioned below the flame element. In regard to claim 7, Harrison shows a light source (16). In regard to claim 8, Harrison discloses in column 2, lines 37-39 the idea of making the flame element from silk.

Claims 9,20,27,34,42, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Harrison (U.S. Patent No. 6,461,011) in view of Quigley as defined in claims 1,12,23,29,37, and 43 above and further in view of Butterfield (U.S. Patent No. 4,965,707).

Harrison in view of Quigley disclose the applicant's basic inventive concept except for treating the flame element with a stiffening material. Butterfield discloses in column 3, lines 65-68 the idea of coating a flame element to improve reflectivity. In view of the teachings of Butterfield it would have been obvious to one in the art to modify Harrison by coating the flame element since this would create a more amusing and aesthetically pleasing display, the coating would inherently stiffen the flame element a small amount.

Claims 10,21, and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pyper (U.S. Patent No. 1,382,229) in view of Hecker (U.S. Patent No. 5,426,879).

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Pyper discloses the applicant's basic inventive concept except for attaching mirrored (reflective) surfaces to the back and side panels. Hecker discloses in column 5, lines 50-55 the idea of placing reflective material on the back and side panels to increase the amount of light reaching the front face. In view of the teachings of Hecker it would have been obvious to one in the art to modify Pyper by attaching reflective surfaces to the back and side panels since this would allow the flame element to be illuminated in a more brilliant manner which would create a more amusing and aesthetically pleasing display.

Applicant's arguments filed 1/15/2004 have been fully considered but they are not persuasive.

The applicant argues that the linkage assembly 21-25 is not "adjustable about a vertical axis to move the flame element" as defined in the claims. The examiner disagrees since Pyper shows in figure 3 that the moving means (21,22,23,24,25 and 28,29) is adjustable about an axis (the axis adjacent element 23 or element 25). The axis would be vertical when the back or front surface of the device is either secured or supported on a horizontal surface, i.e. attached to a ceiling, supported on a desk or table, during shipping, etc.

The applicant argues that Harrison does not teach the use of a blower and a moving means coupled to the flame element and configured to move the flame element from a fixed position. The Harrison patent is now being modified by the Quigley patent to teach the idea of rotating a display about a vertical axis.

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The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Benton et al. teaches the use of a display attached to a ceiling.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian K. Green whose telephone number is (703) 308-1011. The examiner can normally be reached on M-F 7am-3:30pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lesley Morris can be reached on (703) 308-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
BRIAN K. GREEN  
PRIMARY EXAMINER

Bkg  
April 2, 2004